

State of Utah
Administrative Rule Analysis

NOTICE OF PROPOSED RULE

The agency identified below in box 1 provides notice of proposed rule change pursuant to *Utah Code* Sections 63-46a-4. Please address questions regarding information on this notice to the agency. The full text of all rule filings is published in the *Utah State Bulletin* unless excluded because of space constraints. The full text of all rule filings may also be inspected at the Division of Administrative Rules.

DAR file no:		Date filed:	
Utah Admin. Code ref. (R no.):	R156-38a	Time filed:	
Changed to Admin. Code Ref. (R no.):			

1.	Agency:	Commerce/Division of Occupational and Professional Licensing		
	Room no.:			
	Building:	Heber M. Wells Building		
	Street address 1:	160 East 300 South		
	Street address 2:			
	City, state, zip:	Salt Lake City UT 84111-2316		
	Mailing address 1:	PO Box 146741		
	Mailing address 2:			
	City, state, zip:	Salt Lake City UT 84114-6741		
	Contact person(s):			
	Name:	Phone:	Fax:	E-mail:
	Rich Oborn	801-530-6732	801-530-6511	roborn@utah.gov

(Interested persons may inspect this filing at the above address or at DAR between 8:00 a.m. and 5:00 p.m. on business days.)

2.	Title of rule or section (catchline):
	Residence Lien Restriction and Lien Recovery Fund Rules
3.	Type of notice:
	New ___; Amendment XX; Repeal ___; Repeal and Reenact ___
4.	Purpose of the rule or reason for the change:
	Amendments are proposed to include in the rule precedents which have been established by the Residence Lien Recovery Fund Advisory Board and to clarify statute amendments which were made during the 2007 General Session of the Legislature in HB 259. It should be noted that the statute amendments added a definition for "real estate developer" to Subsection 38-11-102(21). However the statute amendments did not mandate rulemaking as a result of those amendments.
5.	This change is a response to comments from the Administrative Rules Review Committee.
	Yes ___; No XXX
6.	Summary of the rule change:
	Throughout the rule the term "rules" has been replaced with "rule" where applicable. In Section 102-Definitions: added a definition for "written contract". Section 204a-Applications for Certificate of Compliance by Homeowners/Supporting Documents and Information: Added in paragraph (2)(c) language applying to applications for a Certificate of Compliance that involve a homeowner who contracted with a real estate developer who is also a licensed contractor on the construction project.
7.	Aggregate anticipated cost or savings to:

	A) State budget: The Division will incur minimal costs of approximately \$75.00 to reprint the rule once the proposed amendments are made effective. Any costs incurred will be absorbed in the Division's current budget.																				
	B) Local government: Proposed amendments do not apply to local governments; therefore no costs or savings are anticipated.																				
	C) Small businesses (fewer than 50 employees) AND persons other than businesses: The Division anticipates no costs or savings to either small businesses or other persons as a result of the proposed amendments. The amendments are only defining the term "written contract" which appears in the statute and indicating what documentation is required for a homeowner who contracted with a real estate developer who is also a licensed contractor on the construction project to provide the Division for the issuance of a Certificate of Compliance related to the Residence Lien Recovery Fund.																				
8.	Compliance costs for affected persons ("person" means any individual, partnership, corporation, association, governmental entity, or public or private organization or any character other than an agency): The Division anticipates no costs or savings to either small businesses or other persons as a result of the proposed amendments. The amendments are only defining the term "written contract" which appears in the statute and indicating what documentation is required for a homeowner who contracted with a real estate developer who is also a licensed contractor on the construction project to provide the Division for the issuance of a Certificate of Compliance related to the Residence Lien Recovery Fund.																				
9.	Comments by the department head on the fiscal impact the rule may have on businesses: No fiscal impact to businesses is anticipated with this rule filing as it codifies a definition for "written contract" pursuant to a ruling of the agency, and brings the rule into compliance with a recent statutory amendment regarding real estate developers who are general contractors on the subject residence. Francine A. Giani, Executive Director																				
10.	This rule change is authorized or mandated by state law, and implements or interprets the following state and federal laws. State code or constitution citations (required): Section 38-11-101 and Subsections 58-1-106(1)(a) and 58-1-202(1)(a)																				
11.	This rule adds, updates, or otherwise changes the following titles of materials incorporated by references (a copy of materials incorporated by reference must be submitted to DAR; if none, leave blank): 																				
12.	The public may submit written or oral comments to the agency identified in box 1. (The public may also request a hearing by submitting a written request to the agency. The agency is required to hold a hearing if it receives requests from ten interested persons or from an association having not fewer than ten members. Additionally, the request must be received by the agency not more than 15 days after the publication of this rule in the <i>Utah State Bulletin</i> . See Section 63-46a-5 and Rule R15-1 for more information.) <table border="1" style="width: 100%;"> <tr> <td colspan="2">A) Comments will be accepted until 5:00 p.m. on (mm/dd/yyyy):</td> <td>12/31/2007</td> </tr> <tr> <td colspan="3">B) A public hearing (optional) will be held:</td> </tr> <tr> <td>on (mm/dd/yyyy):</td> <td>at (time):</td> <td>At (place):</td> </tr> <tr> <td>12/12/2007</td> <td>10:00 am</td> <td>160 East 300 South, North Conference Room (1st floor), Salt Lake City, Utah</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </table>			A) Comments will be accepted until 5:00 p.m. on (mm/dd/yyyy):		12/31/2007	B) A public hearing (optional) will be held:			on (mm/dd/yyyy):	at (time):	At (place):	12/12/2007	10:00 am	160 East 300 South, North Conference Room (1st floor), Salt Lake City, Utah						
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13.	This rule change may become effective on (mm/dd/yyyy):		01/07/2008																		
NOTE: The date above is the date on which this rule MAY become effective. It is <i>NOT</i> the effective date. After the date designated in Box 12(A) above, the agency <i>must</i> submit a Notice of Effective Date to the Division of Administrative Rules to make this rule effective. Failure to submit a Notice of Effective Date will result in this rule lapsing and will require the agency to start the rulemaking process over.																					

14.	Indexing information -- keywords (maximum of four, in lower case, except for acronyms (e.g., "NASA") or proper nouns (e.g., "Medicaid")):		
	licensing	contractors	
	liens		
15.	Attach an RTF document containing the text of this rule change (filename):		R156-38a.pro
To the agency: Information requested on this form is required by Sections 63-46a-4, 5, 6, and 10. Incomplete forms will be returned to the agency for completion, possibly delaying publication in the <i>Utah State Bulletin</i> , and delaying the first possible effective date.			
AGENCY AUTHORIZATION			
Agency head or designee, and title:		F. David Stanley, Director	Date (mm/dd/yyyy): 10/31/2007

ProposedRule.doc 9/26/2003

R156. Commerce, Occupational and Professional Licensing.

R156-38a. Residence Lien Restriction and Lien Recovery Fund Rule[s].

R156-38a-101. Title.

Th~~ese~~is rule~~s-are~~is known as the "Residence Lien Restriction and Lien Recovery Fund Act Rule~~s~~."

R156-38a-102. Definitions.

In addition to the definitions in Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; Title 58, Chapter 1, Division of Occupational and Professional Licensing Act; and Rule R156-1, General Rules of the Division of Occupational and Professional Licensing, which shall apply to th~~ese~~is rule~~s~~, as used in th~~ese~~is rule~~s~~:

(1) "Applicant" means either a claimant, as defined in Subsection (2), or a homeowner, as defined in Subsection (5), who submits an application for a certificate of compliance.

(2) "Claimant" means a person who submits an application or claim for payment from the fund.

(3) "Construction project", as used in Subsection 38-11-203(4), means all qualified services related to the written contract required by Subsection 38-11-204(4)(a).

(4) "Contracting entity" means an original contractor, a factory built housing retailer, or a real estate developer that contracts with a homeowner.

(5) "Homeowner" means the owner of an owner-occupied residence.

(6) "Licensed or exempt from licensure", as used in Subsection 38-11-204(4) means that, on the date the written contract was entered into, the contractor held a valid, active license issued by the Division pursuant to Title 58, Chapter 55 of the Utah Code in any classification or met any of the exemptions to licensure given in Title 58, Chapters 1 and 55.

(7) "Necessary party" includes the division, on behalf of the fund, and the applicant.

(8) "Owner", as defined in Subsection 38-11-102(17), does not include any person or developer who builds residences that are offered for sale to the public.

(9) "Permissive party" includes:

(a) with respect to claims for payment: the nonpaying party, the homeowner, and any entity who may be required to reimburse the fund if a claimant's claim is paid from the fund;

(b) with respect to an application for a certificate of compliance: the original contractor and any entity who has demanded from the homeowner payment for qualified services.

(10) "Qualified services", as used in Subsection 38-11-102(20) do not include:

(a) services provided by the claimant to cure a breach of the contract between the claimant and the nonpaying party; or

(b) services provided by the claimant under a warranty or similar arrangement.

(11) "Written contract", as used in Subsection 38-11-204(4)(a)(i), means one or more documents for the same construction project which collectively contain all of the following:

(a) an offer or agreement conveyed for qualified services that will be performed in the future;

(b) an acceptance of the offer or agreement conveyed prior to the commencement of any qualified services; and

(c) identification of the residence, the parties to the agreement, the qualified services that are to be performed, and an amount to be paid for the qualified services that will be performed.

R156-38a-103a. Authority - Purpose - Organization.

(1) Th[ese]is rule[s-are]is adopted by the division under the authority of Section 38-11-103 to enable the division to administer Title 38, Chapter 11, the Residence Lien Restriction and Lien Recovery Fund Act.

(2) The organization of th[ese]is rule[s] is patterned after the organization of Title 38, Chapter 11.

R156-38a-103b. Duties, Functions, and Responsibilities of the Division.

The duties, functions and responsibilities of the division with respect to the administration of Title 38, Chapter 11, shall, to the extent applicable and not in conflict with the Act or th[ese]is rule[s], be in accordance with Section 58-1-106.

R156-38a-105a. Adjudicative Proceedings.

(1) Except as provided in Subsection 38-1-11(4)(d), the classification of adjudicative proceedings initiated under Title 38, Chapter 11 is set forth at Sections R156-46b-201 and R156-46b-202.

(2) The identity and role of presiding officers for adjudicative proceedings initiated under Title 38, Chapter 11, is set forth in Sections 58-1-109 and R156-1-109.

(3) Issuance of investigative subpoenas under Title 38, Chapter 11 shall be in accordance with Subsection R156-1-110.

(4) Adjudicative proceedings initiated under Title 38, Chapter 11, shall be conducted in accordance with Title 63, Chapter 46b, Utah Administrative Procedures Act, and Rules R151-46b and R156-46b, Utah Administrative Procedures Act Rules for the Department of Commerce and the Division of Occupational and

Professional Licensing, respectively, except as otherwise provided by Title 38, Chapter 11 or ~~th[ese]~~this rule[s].

(5) Claims for payment and applications for a certificate of compliance shall be filed with the division and served upon all necessary and permissive parties.

(6) Service of claims, applications for a certificate of compliance, or other pleadings by mail to a qualified beneficiary of the fund addressed to the address shown on the division's records with a certificate of service as required by R151-46b-8, shall constitute proper service. It shall be the responsibility of each applicant or registrant to maintain a current address with the division.

(7) A permissive party is required to file a response to a claim or application for certificate of compliance within 30 days of notification by the division of the filing of the claim or application for certificate of compliance, to perfect the party's right to participate in the adjudicative proceeding to adjudicate the claim or application.

(8)(a) For claims wherein the claimant has had judgment entered against the nonpaying party, findings of fact and conclusions of law entered by a civil court or state agency submitted in support of or in opposition to a claim against the fund shall not be subject to readjudication in an adjudicative proceeding to adjudicate the claim.

(b) For claims wherein the nonpaying party's bankruptcy filing precluded the claimant from having judgment entered against the nonpaying party, a claim or issue resolved by a prior judgment, order, findings of fact, or conclusions of law entered in by a civil court or a state agency submitted in support of or in opposition to a claim against the fund shall not be subject to readjudication with respect to the parties to the judgment, order, findings of fact, or conclusions of law.

(9) A party to the adjudication of a claim against the fund may be granted a stay of the adjudicative proceeding during the pendency of a judicial appeal of a judgment entered by a civil court or the administrative or judicial appeal of an order entered by an administrative agency provided:

(a) the administrative or judicial appeal is directly related to the adjudication of the claim; and

(b) the request for the stay of proceedings is filed with the presiding officer conducting the adjudicative proceeding and concurrently served upon all parties to the adjudicative proceeding, no later than the deadline for filing the appeal.

(10) Notice pursuant to Subsection 38-1-11(4)(f) shall be accomplished by sending a copy of the division's order by first class, postage paid United States Postal Service mail to each lien claimant listed on the application for certificate of

compliance. The address for the lien claimant shall be:

(a) if the lien claimant is a licensee of the division or a registrant of the fund, the notice shall be mailed to the current mailing address shown on the division's records; or

(b) if the lien claimant is not a licensee of the division or a registrant of the fund, the notice shall be mailed to the registered agent address shown on the records of the Division of Corporations and Commercial Code.

R156-38a-204a. Applications for Certificate of Compliance by Homeowners - Supporting Documents and Information.

The following supporting documents shall, at a minimum, accompany each homeowner application for a certificate of compliance:

(1) a copy of the written contract between the homeowner and the contracting entity;

(2)(a) if the homeowner contracted with an original contractor, documentation issued by the division that the original contractor was licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, on the date the contract was entered into;

(b) if the homeowner contracted with a real estate developer:

(i) credible evidence that the real estate developer had an ownership interest in the property;

(ii) a copy of the contract between the real estate developer and the licensed contractor with whom the real estate developer contracted for construction of the residence or other credible evidence showing the existence of such a contract and setting forth a description of the services provided to the real estate developer by the contractor;

(iii) credible evidence that the real estate developer offered the residence for sale to the public; and

(iv) documentation issued by the division that the contractor with whom the real estate developer contracted for construction of the residence was licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, on the date the contract was entered into;

(c) if the real estate developer is a licensed contractor under Title 58, Chapter 55, Utah Construction Trades Licensing Act who engages in the construction of a residence that is offered for sale to the public:

(i) credible evidence that the contractor real estate developer has an ownership interest in the property;

(ii) a copy of the contract between the homeowner and the contractor real estate developer;

(iii) credible evidence that the contractor real estate

developer offered the residence for sale to the public; and
(iv) documentation issued by the Division showing that the contractor real estate developer with whom the homeowner contracted for construction of the residence was licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, on the date the contract was entered into;

([e]d) if the homeowner contracted with a manufactured housing retailer, a copy of the completed retail purchase contract;

(3) one of the following:

(a) except as provided in Subsection (5), an affidavit from the contracting entity acknowledging that the homeowner paid the contracting entity in full in accordance with the written contract and any amendments to the contract; or

(b) other credible evidence establishing that the homeowner paid the contracting entity in full in accordance with the written contract and any amendments to the contract; and

(4) an affidavit from the homeowner establishing that he is an owner as defined in Subsection 38-11-102(17) and that the residence is an owner-occupied residence as defined in Subsection 38-11-102(18).

(5) If any of the following apply, the affidavit described in Subsection (3)(a) shall not be accepted as evidence of payment in full unless that affidavit is accompanied by independent, credible evidence substantiating the statements made in the affidavit:

(a) the affiant is the homeowner;

(b) the homeowner is an owner, member, partner, shareholder, employee, or qualifier of the contracting entity;

(c) the homeowner has a familial relationship with an owner, member, partner, shareholder, employee, or qualifier of the contracting entity;

(d) the homeowner has a familial relationship with the affiant;

(e) an owner, member, partner, shareholder, employee, or qualifier of the contracting entity is also an owner, member, partner, shareholder, employee, or qualifier of the homeowner;

(f) the contracting entity is an owner, member, partner, shareholder, employee, or qualifier of the homeowner; or

(g) the affiant stands to benefit in any way from approval of the claim or application for certificate of compliance.

KEY: licensing, contractors, liens

Date of Enactment or Last Substantive Amendment: ~~[August 2, 2005]~~ 2008

Notice of Continuation: March 15, 2005

Authorizing, and Implemented or Interpreted Law: 38-11-101; 58-1-106(1)(a); 58-1-202(1)(a)